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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-129

GARY SUCHY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, by and through his attorney, JAMES D. O'CONNELL, prays that a Writ of Certiorari issue to review the judgment heretofore entered against him by the United States Court of Appeals for the Sixth Circuit.

1. OPINIONS BELOW

Petitioner was convicted in the United States District Court for the Eastern District of Michigan, Southern Division, by a jury, the Honorable Philip Pratt, presiding. The jury returned its verdicts on May 6, 1974, with respect to violations of Title 21—U.S. Code §§ 841(a)(1) and 846. On or about July 12, 1974, timely Notice of Appeal was filed, said Notice being set out as Appendix A, infra. On April 2, 1975, the Court of Appeals for the Sixth Circuit reversed in part and affirmed in part, Petitioner's convictions. The written opinion of the Court of Appeals is set out as Appendix B, infra. On April 22, 1975, Petitioner caused his Petition for Rehearing to be filed with the Court of Appeals, said Petition having been denied by the Court on or about June 20, 1975. (See Appendix C, infra.)

2. JURISDICTION

The opinion and judgment of the Court of Appeals for the Sixth Circuit was entered on April 2, 1975. Rehearing was denied on or about June 20, 1975. The jurisdiction of this Honorable Court is invoked pursuant to the provisions of Title 28—U.S. Code—§ 1254(1).

3. QUESTIONS PRESENTED

I. UNDER THE CURRENT POSTURE OF THE SIXTH AMENDMENT'S GUARANTEE OF A FAIR AND IMPARTIAL TRIAL, AND WHERE THE COURT OF APPEALS REVERSES PETITIONER'S CONVICTION FOR CONSPIRACY, MAY CONVICTIONS ON THREE INTERRELATED SUBSTANTIVE COUNTS BE PERMITTED TO STAND?

II. UNDER THE CURRENT POSTURE OF THE SIXTH AMENDMENT'S GUARANTEE OF A FAIR AND IMPARTIAL TRIAL, WAS PETITIONER'S CONVICTION ON COUNTS II, III, AND IV FATALLY TAINTED BY THE INTRODUCTION INTO EVIDENCE OF HEARSAY TESTIMONY ATTRIBUTED TO LUTHER GIST, WHERE THE DEFENSE WAS UNABLE TO REBUT SAID EVIDENCE ON GROUNDS THAT LUTHER GIST WAS DECEASED?

4. CONSTITUTIONAL AND STATUTORY PROVISIONS

AMENDMENT VI — JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and

to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

TITLE 21 — UNITED STATES CODE

Section 841 — Prohibited acts A — Unlawful acts:

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —

(1) to manufacture, distribute or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

Section 846 — Attempt and Conspiracy:

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

5. STATEMENT OF THE CASE

The record in this case reflects that Petitioner was charged in a four (4) count indictment which alleged that Gary Suchy:

Count I. Conspired with unindicted co-conspirator, Luther Gist, to sell and distribute approximately ⅛ kilogram of heroin in violation of 21 U.S. Code—§§841(a)(1) and 846.

Count II. Unlawfully possessed 21.6 grams of heroin with intent to distribute in violation of 21—U.S. Code—§ 841(a)(1).

Count III. Unlawfully possessed 189 grams of heroin with intent to distribute in violation of 21—U.S. Code—§ 841(a)(1).

Count IV. Unlawfully distributed 189 grams of heroin in violation of 21—U.S. Code— § 841(a)(1).

According to the indictment, each of the above offenses occurred at the L & F Party Store located on Shoemaker Street in the City of Detroit, said store being owned and operated by one Luther Gist, and that said offenses occurred on December 14, 1972. Petitioner Suchy was arrested by a team of federal and state agents working under the direction of Special Agent Ronald Garibotto of the Drug Enforcement Agency; and that Petitioner's arrest was effected during the course of the previously described raid conducted on December 14, 1972.

Subsequent to arrest, Petitioner Suchy, Luther Gist and one Allison McCormick were jointly indicted and charged with conspiracy to violate 21—U.S. Code—§841(a)(1) and 846 as well as substantive violations of § 841(a)(1). At sometime following the original indictment, Luther Gist died and the Government successfuly moved to have the charges pending against him dismissed. Evidently, the case against Allison McCormick was likewise dismissed although there appears to be no official record of said dismissal. In any event, on April 4, 1973, a superseding indictment was returned against Gary Suchy, which named this Petitioner as the sole defendant but named Luther Gist as an unindicted co-conspirator. The instant indictment is void of any mention of Allison McCormick.

Petitioner's trial to a jury commenced on May 1, 1974, and on May 6, 1974, the jury returned verdicts of guilty as charged on Counts I, III, and IV. On Count II, the jury found Petitioner guilty of "Possession of a controlled substance" in violation of 21—U.S. Code— § 844(a), a lesser included offense under Count II of the indictment.

On July 12, 1974, Petitioner was sentenced to concurrent five (5) year terms of imprisonment on Counts I, III, and IV, and a concurrent one (1) year term on Count II. Direct appeal followed to the Court of Appeals for the Sixth Circuit with Petitioner being enlarged on bail during the pendency of said appeal.

On April 2, 1975, the Court of Appeals, in a per curiam order, directed that Petitioner's conviction for conspiracy be reversed on grounds that the evidence adduced at trial was insufficient to sustain said conviction. The Court then proceeded to affirm Petitioner's conviction on Counts II, III, and IV. The Sixth Circuit's opinion and order is set out in full at Appendix B, infra.

At trial the Government proceeded on the theory that Luther Gist was known to be a dealer in hard narcotics and that Petitioner Suchy was purported to be one of his sources of heroin. The evidence presented at trial polarized upon the testimony of one Bernard Taylor, a Detroit Police Officer who was alleged to have been working in an undercover capacity for Agent Garibotto. Taylor related to the jury that he had been introduced to Gist by a "co-operating individual" (Tr. p. 41), but refused to admit that this person was, in fact, a paid Government informer. (Tr. p. 42).

Taylor testified that during the time he knew Gist, he made several small purchases of heroin and that about

a month following the initial introduction, he negotiated the purchase of a substantial amount of heroin (approximately 1/8 kilogram), from Gist. (Tr. p. 23). According to Taylor, Gist informed him that he could obtain this quantity through a source identified only as "Bozo" and/or "Gary." Gist then identified his source as being a "long haired hillbilly." (Tr. pp. 24, 25).

Taylor then testified that he and Gist met on December 13, 1972, and agreed that the transaction would take place between 12:30 and 1:00 p.m. on December 14, 1972, at Gist's place of business known as the L & F Party Store, 10901 Shoemaker, Detroit. (Tr. p. 25).

Taylor then related that a police surveillance team was used to cover all activity at the party store in anticipation of the purported sale. Taylor further related that at approximately 11:00 a.m. on the morning of December 14, 1972, he observed Petitioner Suchy arrive at and enter the party store. A minute or two later, Petitioner was observed exiting the store, walking to his car, and extracting a large painting from the car, then re-entering the store. (Tr. p. 29). Taylor, who claimed he was inside the store, then stated that he observed Petitioner with a white paper bag in his hand which Suchy purportedly gave to Gist. Taylor also stated that Gist told him that he was expecting "Bozo" to make a delivery of heroin at approximately 12:30 p.m. (Tr. pp. 32-34).

Taylor and Gist then adjourned to the basement where Gist purportedly produced some heroin and gave Taylor a sample for testing. Taylor related that he took the sample out to his car where he turned the sample over to another agent who performed the tests and declared that the material Gist had produced was heroin. Taylor purportedly made his way back to the store and within seconds,

the police agencies began their raid on the premises. During the course of the raid, Petitioner Suchy was arrested along with Gist and several other occupants of the party store. (Tr. pp. 35, 36, 40).

Detroit Police Officer, Thomas Councell, testified that during the course of the raid, he observed Petitioner Suchy sitting on some steps which apparently led to an upstairs apartment belonging to Gist. (Tr. p. 117). Councell then stated that he went up the steps and entered the apartment whereupon he discovered several manila envelopes which contained approximately 21.6 grams of heroin.[1] (Tr. p. 119).

At trial, several Government witnesses testified that they positively identified Petitioner Suchy from their surveillance vantagepoints (Tr. pp. 61, 63, 101, 108); yet the testimony also included the fact that Petitioner admitted that he was at the scene for the purpose of discussing a real estate transaction with Gist, and the further fact that Agent Garibotto, upon entering the store, asked Suchy if he was a federal officer taking part in the raid. (Tr. p. 118). At this point in the raid, Petitioner was not under arrest nor was his presence inside the store equated with a clandestine narcotics sale.

On this factual basis, Petitioner was convicted in the District Court of conspiring with Luther Gist to distribute heroin; with possession of a controlled substance; with possession of heroin for distribution; and with the actual distribution of heroin.

On direct appeal, the Court of Appeals for the Sixth reversed Petitioner's conviction on the charge of con-

[1] The heroin found by Patrolman Councell is the 21.6 grams which anchors the charge contained in Count II.

spiracy, but affirmed the convictions for possession and distribution. Petition for rehearing was denied and this Petition for a Writ of Certiorari follows.

6. REASONS FOR GRANTING THE WRIT

The record below reflects that Petitioner was convicted in the District Court of conspiring with one Luther Gist to violate Title 21—U.S. Code—§ 841(a)(1), that is to sell and distribute approximately 1/8 kilogram of heroin. Said conspiracy being a violation of Title 21—U.S. Code —§ 846. Petitioner was also convicted of: (Count II), possession of a controlled substance in violation of Title 21 —U.S. Code—§ 844(a);[2] (Count III), possession, with intent to distribute, approximately 189 grams of heroin, and; (Count IV), the unlawful distribution of approximately 189 grams of heroin, in violation of 21—U.S. Code —§ 841(a)(1).

On direct appeal to the Court of Appeals for the Sixth Circuit, the Court below reversed Petitioner's conviction for conspiracy and in so doing stated: "Upon careful consideration of the records in the case and of the briefs and oral arguments of counsel, the court is of the opinion that there was insufficient evidence, apart from the hearsay testimony of Police Officer Taylor, from which a prima facie case of conspiracy could be made out against the Defendant Suchy. Accordingly, for this reason his conviction on Count I cannot stand." [Citation ommitted], (Op. of Ct. pp. 29-31, infra.)

[2] Possession of a controlled substance under 21 — U.S. Code — § 844(a) is a lesser, but included offense under 21 — U.S. Code — § 841(a)(1).

The Court of Appeals then went on to affirm Petitioner's convictions on Counts II, III, and IV on grounds that, in the court's opinion, ". . . that the direct and positive evidence of the defendant's guilt on the substantive charges was sufficient and independent of the hearsay evidence so as not to require a remand and new trial on the substantive charges." (Op. of Ct. p. 31, infra.) The court added: ". . . that none of the hearsay evidence admitted to establish the conspiracy prejudiced Suchy's right to a fair trial on the substantive counts" [citation omitted]. (Op. of Ct. p. 31, infra.)

Petitioner contends herein that upon a finding by the Court of Appeals that there was insufficient evidence to sustain the conviction on the charge of conspiracy, the convictions obtained on the substantive counts should have been reversed and a new trial ordered. Petitioner also contends that conviction on the substantive counts was fatally tainted by the introduction into evidence of hearsay testimony attributed to a person who at the time, was deceased, and named in the indictment as an unidicted co-conspirator.

I.

UNDER THE CURRENT POSTURE OF THE SIXTH AMENDMENT'S GUARANTEE OF A FAIR AND IMPARTIAL TRIAL, AND WHERE THE COURT OF APPEALS REVERSES PETITIONER'S CONVICTION FOR CONSPIRACY, MAY CONVICTIONS ON THREE INTERRELATED SUBSTANTIVE COUNTS BE PERMITTED TO STAND?

The issue argued herein contains several elements which must be considered as a whole. The first is the fact that the jury, having heard all the evidence presented in the District Court, adjudged Petitioner guilty on Counts I, III, and IV, and guilty of a lesser included offense under

Count II. Subsequently, on direct review, the Court of Appeals for the Sixth Circuit reversed Petitioner's conviction for conspiracy (Count I) on grounds that the evidence adduced at trial was insufficient to sustain conviction. Notwithstanding the requirement that upon review, the Court of Appeals must view the evidence in the light most favorable to the Government, *Glasser v. United States.* 316 U.S. 60 (1942), the court reversed.

Secondly, the record reflects that Petitioner was tried by himself on all counts in a case wherein the Government's only link with a joint venture was a dead man.

Finally, the Government's case-in-chief polarized on the background, activity and propensity of Luther Gist to sell and distribute narcotic drugs in violation of federal law.

In reversing Petitioner's conviction for conspiracy, the Sixth Circuit relied upon the rationale set out in *United States v. Williams,* 503 F. 2d 50 (6th Cir. 1974), which holds that the Government is required to prove (a) an agreement between two or more persons to act in concert in committing an offense, and; (b) an overt act in furtherance of the conspiracy. *United States v. Williams,* 503 F. 2d 50, at 54. The *Williams* rationale follows a long line of cases flowing from this Court's decision in *United States v. Falcone,* 311 U.S. 205, 61 S. Ct. 204, 85 L. Ed. 128 (1940); see also: *United States v. Webb,* 359 F. 2d 558 (6th Cir. 1966), and *United States v. McGann,* 431 F. 2d 1104 (5th Cir. 1970). Under the test applied to conspiracy cases in the Sixth Circuit, an agreement between conspirators may be inferred from the testimony at trial. *United States v. Webb,* supra. An inference as to an agreement (absent direct evidence thereof), coupled with an overt act committed by a defedant is sufficient to sustain conviction for conspiracy. In the matter at bar, and follow-

ing the *Williams* guidelines, the Sixth Circuit correctly found that there existed no evidence to support the proposition that there was an agreement to violate the narcotics laws entered into between Gist and Suchy nor did Suchy commit an overt act in furtherance of the alleged conspiracy. Without proof of these two elements, conviction for conspiracy demanded reversal. *United States v. Sarno,* 456 F. 2d 875 (1st Cir. 1972); *Schnautz v. United States,* 263 F. 2d 525 (5th Cir. 1959); *Hall v. United States,* 109 F. 2d 976 (10th Cir. 1940); and *Condrey v. United States,* 351 F. 2d 456 (5th Cir. 1965).

Basically, the facts adduced at trial are as follows:

(a) Luther Gist allegedly contacted his "source" on December 13, 1972 and allegedly told Officer Taylor that delivery of the heroin was assured. (Tr. pp. 23, 24)

(b) That the "source" was described by Gist as being a caucasian, hillbilly type, with long hair. (Tr. pp. 24, 25).

(c) That Luther Gist stated to Officer Taylor that his source was leery about delivering the heroin on the evening of December 13, 1972, but that the heroin would be delivered on December 14, 1972. (Tr. pp. 25, 26)

(d) That Officer Taylor observed Petitioner entering the L & F Party Store on December 14, 1972, and that Petitioner spoke to Luther Gist. (Tr. pp. 30-32)

(e) That Officer Taylor and Special Agent Smith observed Petitioner leave the store and a minute or two later re-enter the store carrying a paper bag and a large painting. (Tr. pp. 33, 34, 109, 113, and 114).

(f) That Petitioner handed the items he was carrying to Luther Gist. (Tr. p. 34)

(g) That Luther Gist and Officer Taylor left Petitioner's presence and according to Taylor went to the basement of the party store where they (Gist and Taylor) made a narcotics transaction. (Tr. pp. 35, 36).

On these facts, the jury convicted. However the record also indicates that prior to submitting the case to the jury, the trial court entertained a defense motion for judgment of acquittal. In denying the motion, the court stated:

". . . this case revolves around the testimony of Officer Taylor. If that testimony is believed by the jury, along with other facts and reasonable inferences, then there would be provided a basis for conviction." (Tr. p. 169). Moreover, during the course of Taylor's testimony, the court advised the jury:

> "THE COURT: Ladies and Gentlemen, as you know, it is alleged, this first count is a conspiracy. Statements of one person to another is usually hearsay and not admissible in evidence. However, an exception is made where there is a conspiracy established. You must then bear in mind that these statements that are made in conversations with Mr. Gist for example, who was an alleged co-conspirator, is not relevant unless it is established to your satisfaction that first, a conspiracy did exist, second that Mr. Suchy was a member of that conspiracy; and thirdly, that the statement that is now being given to you in evidence was a statement made in furtherance of that conspiracy. Otherwise, of course, this testimony would not be

admissable, because it is between two people and doesn't involve Mr. Suchy unless you first find that there is a conspiracy and Mr. Suchy was a member of that conspiracy and that this statement and any other statements that you may hear are in furtherance of this conspiracy. Because of the fact that we can only do one thing at a time, of course, we permit this leeway at this stage of the proceedings even before any mention of a conspiracy is made." (Tr. p. 22)

From the foregoing, it can be stated with assurance that the substance of the Government's case-in-chief came from the lips of Officer Taylor and polarized on Taylor's relationship with Luther Gist. We can also draw the conclusion that the trial court erroneously instructed the jury relative to Taylor's hearsay testimony absent any prima facie showing that a conspiracy did in fact exist independent of the hearsay testimony. (This proposition is fully set out in the arguments attendant to Issue II, infra.) At this point, and in the light of the subsequent reversal on the conspiracy charge, the court erred in admitting Taylor's hearsay evidence to be heard by the jury.

An analysis of the facts in this case in relation to the jury's verdict is instructive:

Luther Gist was a known narcotics dealer as was evidenced by Officer Taylors testimony that he had purchased quantities of heroin from Gist on prior occasions. When Taylor attempted to induce Gist to sell him a larger quantity of heroin, Gist informed Taylor that he would have to contact his source who was described as a white, hillbilly with long hair. According to Tayor, Gist mentioned the name Gary as well as the name "Bozo" but the record indicates that when Gist introduced Taylor to Suchy, he

did so under the name of "James" (Tr. pp. 27, 28, 34). Suchy, as part of his testimony, freely admitted to being at the party store belonging to Gist on the morning of December 14, 1972, and that during the raid conducted at the store, he admitted that he sat on the steps and watched what was going on.

However, a close reading of the trial transcript indicates that Petitioner was certainly not a hillbilly type, with long hair, nor did Suchy ever respond to the names "Bozo" or "James." Suchy testified that he had gone to the party store to discuss with Gist the potential purchase, by Gist, of his parents' party store located in another section of Detroit. The record also reflects that Suchy told the court and the jury that while he was in the store, he purchased a can of beer which was placed in a paper bag, and that it was this bag that Taylor evidently observed. Suchy also testified that he did, in fact, return to his car after a brief discussion with Gist, but that the sole purpose of that was to remove a painting from the car and take it to Gist. This record is absolutely void of any evidence which would establish that Petitioner took part in an illegal narcotics transfer. Taylor himself testified that Suchy did not accompany him and Gist to the basement where the deal was made, and the record is clear that Suchy's presence and conduct inside the party store was consistent with that of a customer and acquaintence of the owner, Luther Gist.

As stated above, the jury convicted Gary Suchy on the spurious evidence adduced at trial, but on those same facts, the Court of Appeals was obliged, as a matter of law, to reverse Petitioner's conspiracy conviction. Petitioner takes serious issue with the validity of the appellate court's decision to let stand the convictions obtained on the possession and distribution counts.

The facts in this case equate with the single proposition that Petitioner was present at the L & F Party Store during the time when Luther Gist was transacting a narcotics sale with an undercover police officer. There is no evidence in the record below to establish that Petitioner (1) possessed, distributed or in any other way, took part in the transaction, and; (2) or facilitated the sale or distribution of narcotics.

It is well settled that association with others who are committing an illegal act is an insufficient basis for a finding of participation. *United States v. Stromberg,* 268 F. 2d 256 (2nd Cir. 1959); *United States v. Di Re,* 332 U.S. 581, 68 S. Ct. 222, 92 L. Ed. 210 (1948); and *United States v. Hickey,* 360 F. 2d 127 (7th Cir. 1966).

A case in point is *Bailey v. United States,* 416 F. 2d 1110 (C.A.D.C. 1969), where the District of Columbia Circuit reversed a conviction for robbery because the evidence was insufficient to find that the defendant participated in the crime. In the case at bar, however, the Court of Appeals anchored its affirmation of Petitioner's convictions on the substantive counts on the case of *United States v. Johnson,* 462 F. 2d 608 (8th Cir. 1972), which like the *Bailey* case, deals with the proposition of aiding and abetting. The *Bailey* court (Robinson, J), delineated the criteria other than presence or association which was necessary to establish the crime:

> "Appellant's conduct, as portrayed in the view most favorable to the Government, amounted to presence at the scene of the crime, slight prior association with the actual perpetrator, and subsequent flight. A *sine qua non* of aiding and abetting, however, is guilty participation by the accused. In order to aid and abet another to commit a crime, it is necessary that a defendant in some way associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed."

In *United States v. Johnson,* supra, the court found that the evidence supported defendant's conviction. That evidence included Johnson's presence in an apartment when plans for robbing the bank were discussed; Johnson's agreement to steal a car for use in the robbery; the actual theft of a car and the transportation of two of the robbers by Johnson to the bank in the stolen car; and Johnson's driving away of a second stolen car which was to be used by the robbers as the "switch" or get-away car. Under these circumstances the court upheld Johnson's conviction. *Nye & Nissen v. United States,* 336 U.S. 613, 69 S. Ct. 766, 93 L. Ed. 919 (1949).

When the evidence in the matter at bar is compared and analyzed within the parameters of the rationale set out in *Bailey v. United States, supra,* and *United States v. Johnson, supra,* it is clear that Petitioner's conduct at the L & F Party Store on December 14, 1972, does not warrant the conclusion that he participated in Luther Gist's attempt to sell narcotics to an undercover police officer. Petitioner's presence at the party store and his limited conversation with Gist coupled with the disputed fact that he was carrying a paper bag, the contents of which was actually unknown to the jury is insufficient to infer that Suchy possessed and distributed heroin or in any other way, participated in or facilitated a narcotics transaction. *Hicks v. United States,* 150 U.S. 442, 14 S. Ct. 144, 37 L. Ed. 1137; *United States v. Kelton,* 446 F. 2d 669 (8th Cir. 1971); and *United States v. Baker,* 499 F. 2d 845 (7th Cir. 1974). See also: *United States v. Bentvena,* 319 F. 2d 916 (2nd

Cir. 1963); and *United States v Cardi,* 478 F. 2d 1362 (7th Cir. 1973).

Scrutinizing this case in the light of the actual evidence, it becomes readily understandable why the court of appeals refused to permit petitioner's conviction for conspiracy to stand. However, Petitioner maintains that the court's affirmation of the convictions in relation to possession and distribution of controlled substances is inconsistent with the facts as well as the controlling case law.

In the Sixth Circuit, the evidentiary test concerning the establishment of a conspiracy and the participation of an individual defendant has been stated in *United States v. Levinson,* 405 F. 2d 971 (6th Cir. 1968), *cert. den.* 395 U.S. 906. Circumstantial evidence alone is enough to sustain a conspiracy conviction. *Glasser v. United States,* 316 U.S. 60 (1942); *United States v. Chambers,* 382 F. 2d 910 (6th Cir. 1967); *Blumenthal v. United States,* 332 U.S. 539 (1947); and *United States v. Rich,* 262 F. 2d 415 (2nd Cir. 1959). Once the existence of a conspiracy has been established only *slight evidence* is needed to connect a defendant with it. *United States v. Chambers, supra; United States v. Santana,* 503 F. 2d 710 (2nd Cir. 1974); and *United States v. Talbot,* 470 F. 2d 158 (6th Cir. 1972).

Notwithstanding these guidelines, the court below found that the evidence was insufficient to sustain conviction for conspiracy. A close review of the record indicates that the evidence purportedly supporting the conviction of possession and distribution is even more spurious than that which was rejected by the reviewing court.

Count II. Petitioner was convicted of possession of a controlled substance on evidence which established that 21.6 grams of alleged heroin was found in an upstairs apartment belonging to Luther Gist. The only evidence presented to support conviction on this count was the fact, undisputed, that Petitioner Suchy was observed to have been sitting on the steps which led to this apartment. No evidence was presented which could lead to the conclusion that Suchy had ever been in the apartment, no fingerprints (Suchy's) were found on the packets which contained the drugs; no fingerprints (Suchy's) were presented into evidence which would have formed a basis for the conclusion that Suchy had opened the door or had been in the apartment. In short, Suchy was convicted on this count because he had the misfortune of being present at the scene.

Counts III & IV: The only direct evidence presented at trial relative to possession with intent to distribute heroin and the actual distribution of heroin was that Petitioner was observed with a paper bag in his hand at sometime after he arrived at the scene. Again, no evidence was introduced to prove that Suchy participated in a narcotics transaction. Even Officer Taylor testified that Suchy was not present when he and Gist made the deal in the basement of the party store.

The record further indicates that upon being arrested, Suchy was searched; his car was searched and impounded, yet no drugs or drug paraphernalia was found; no contraband money was found and even Suchy's automobile was returned at a later date.

The law relative to possession is clear: (1) actual possession of contraband by one party may not be attributed to another where the Government fails to prove a conspiracy, concert of action or participation in a crime. *United States v. Infanti,* 474 F. 2d 522 (2nd Cir. 1973). (2) constructive possession of contraband may not be inferred in an illegal transaction unless the Government can establish, first that the defendant could set the price for the contraband; second, that the defendant had the final

say relative to the transfer (distribution) of the contraband; and finally, that the defendant was able to assure the delivery of the contraband. In short, before conviction could be sustained on the substantive charges of possession with intent to deliver heroin and the distribution thereof, the Government would be required to prove that Petitioner had dominion and control over the contraband. *United States v. Steward,* 451 F. 2d 1203 (2nd Cir. 1971); *United States v. Febre,* 425 F. 2d 107 (2nd Cir. 1970); *United States v. Garguilo,* 310 F. 2d 249 (2nd Cir. 1962); and *United States v. Cianchetti,* 315 F. 2d 584 (2nd Cir. 1963). Under the circumstances presented in the court below, Suchy's presence in the party store at the time Gist was dealing narcotics to Taylor was not sufficient to establish actual or constructive possession of a controlled substance. *United States v. Kearse,* 444 F. 2d 62 (2nd Cir. 1971). See also: *United States v. Webb,* 359 F. 2d 558 (6th Cir. 1966); *United States v. Falcone,* 311 U.S. 205, *supra; Diaz-Rosenado v. United States,* 364 F. 2d 941 (9th Cir. 1966); and *United States v. Quintana,* 508 F. 2d 867 (7th Cir. 1975).

Petitioner respectfully suggests that certiorari should issue and that the convictions for possession with intent to distribute and distribution of a controlled substance be reversed.

II.

UNDER THE CURRENT POSTURE OF THE SIXTH AMENDMENT'S GUARANTEE OF A FAIR AND IMPARTIAL TRIAL, WAS PETITIONER'S CONVICTION ON COUNTS II, III, AND IV, FATALLY TAINTED BY THE INTRODUCTION INTO EVIDENCE OF HEARSAY TESTIMONY ATTRIBUTED TO LUTHER GIST, WHERE THE DEFENSE WAS UNABLE TO REBUT SAID EVIDENCE ON GROUNDS THAT LUTHER GIST WAS DEAD?

This case presents a classic example of what can happen when the Government is permitted to try a conspiracy and substantive prosecution at the same time. The reason the Government engages in this practice is simple: courts throughout this country have been satisfied to relax the evidentiary safeguards normally attributed to the prosecution of criminal offenses. Generally, the results of this laxity have caused abuses which fundamentally conflict with the concept of equal, fair and impartial justice. The most significant area of abuse may be found in the practice of permitting otherwise inadmissible evidence to be considered by the jury. For example, in a conspiracy trial, it is now accepted that hearsay declarations, extra-judicial in nature, and purportedly made in furtherance of an illegal venture, by one party, may be admitted against another party to the alleged transaction. See: *United States v. Jones,* 438 F. 2d 461 (7th Cir. 1971); *United States v. Holmes,* 452 F. 2d 249 (7th Cir. 1971); *United States v. Rinaldi,* 393 F. 2d 97 (2nd Cir. 1968); and *McMahan v. United States,* 424 F. 2d 1216 (7th Cir. 1970), to name but a few.

In this case, the Government charged Petitioner with conspiring to violate the federal narcotics laws with one Luther Gist, a known dealer in illicit drugs. Petitioner

was also charged with possession with intent to distribute heroin and the actual distribution of heroin. At sometime after the original indictment, Luther Gist died and the Government dismissed the charges against him. Subsequently, Petitioner was indicted as a single defendant and charged with conspiracy and possession as well as distribution of heroin. This time, however, Luther Gist was named in the indictment as an unindicted co-conspirator.

At trial, the Government was permitted to present its case-in-chief through the testimony of Officer Bernard Taylor whose evidence consisted mainly of hearsay declarations purportedly made to him by the deceased Luther Gist. The trial court permitted this evidence to be heard by the jury in accord with the above-stated exception to the hearsay rule which has been applied to conspiracy cases. However, the record below strongly suggests that the trial court committed reversible error by permitting the hearsay declarations into evidence before the Government was required to prove the independent existence of a joint venture (Tr. p. 22, *supra*). The fact that the Government could not carry its burden of proof as to the conspiracy is underscored by the fact that the court of appeals, on direct review, reversed the conviction. Nevertheless, the jury was permitted to hear and digest all of the hearsay attributable to Luther Gist and the defense was deprived of any rebuttal.

The issue herein is a simple one. On the one hand, the Government was permitted to introduce hearsay testimony which would have been completely inadmissible if this case had been prosecuted on the substantive counts alone. The jury was permitted to consider this hearsay in arriving at their verdict, and as the record reflects, Petitioner was convicted. On the other side of the coin is the fact that the court of appeals reversed Petitioner's conviction for conspiracy, but affirmed conviction on the substantive counts. The proposition conflicts not only with the rules of law which apply, but with the basic concept of a fair and impartial trial, a right which is protected by the Sixth Amendment to the Constitution.

The jury, which consisted entirely of lay people, were instructed by the court that if they found that a conspiracy did, in fact, exist, then they could consider the extrajudicial statements made by Gist as evidence against Suchy. The jury found that the conspiracy existed and the logical conclusion is that whatever Gist purported to say was evidence against Suchy. It is only a baby-step away to go from the conspiracy to the substantive counts on the basis of Gist's declarations. The jury found Petitioner guilty on those counts as well.

The court of appeals, whose panel is made up of very sophisticated lawyers, with long experience in dealing with complex legal issues, made short shrift of the Government's evidentiary basis relative to the alleged conspiracy. The court reversed.

Inconsistent with the court's reversal is the affirmation of Petitioner's conviction on the substantive counts. The court stated: "A review of the record indicates that none of the hearsay evidence admitted to establish the conspiracy prejudiced Suchy's right to a fair trial on the substantive counts." (Op. of Ct. p. 31, *infra.*) The difficulty on in the court's evaluation of what the jury concluded on the basis of all the evidence presented at trial. It is sufficient to suggest that no court or reviewing panel could assume the exact attitudes of a jury and thereby make a decision on whether or not a jury was prejudiced by evidence which was totally inadmissible. Both the Supreme Court and the Sixth Circuit have spoken on this exact

point. In 1949, Mr. Justice Jackson, speaking in *Krulewitch v. United States,* 336 U.S. 440, 457, 69 S. Ct. 716, 93 L. Ed. 790 (1949), stated:

> "There is, of course, strong temptation to relax rigid standards when it seems the only way to sustain convictions of evildoers. But statutes authorize prosecution for substantive crimes for most evildoing without the dangers of liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges. We should disapprove the doctrine of implied or constructive crime in its entirety and in every manifestation. And I think there should be no straining to uphold any conspiracy conviction where prosecution for the substantive offenses is adequate and the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction."

In 1973, the Sixth Circuit decided the case of *United States* v. *Lucido,* 486 F. 2d 868 (1973). In reversing and remanding for new trial, the Court held that a major portion of the evidence introduced against Lucido was hearsay. At trial, the evidence was permitted on the basis that the hearsay was admissible when the prosecution involved a conspiracy as well as substantive charges. However, the jury acquitted Lucido of the conspiracy but convicted him on the substantive count. The Court of Appeals reversed on the following rationale:

> "This case is an example of the potential hazards to a fair trial when the charge of conspiracy coupled with substantive charges confers upon the government a substantial procedural advantage. The Supreme Court has long recognized the dangers incident to the use of a conspiracy charge by government prosecutors. E. g. *United States v. Falcone,* 311 U.S. 205, 61 S. Ct. 204, 85 L. Ed 128 (1940).

What must be guarded against are the potentialities for injustice so clearly perceived by Mr. Justice Jackson in his oft-quoted statement, in his concurring opinion in *Krulewitch v. United States.*

Since the jury has found that the conspiracy was not established, the government's admissible evidence on the substantive charge is vastly reduced. The purpose of the rules of evidence is to preserve procedural fairness for all parties to a proceeding. To permit hearsay evidence to support a substantive charge on the theory of the "conspiracy" exception where the charge of a conspiracy has been specifically rejected by the jury would not only undercut the very foundation of the exception, but would magnify the dangers to the liberty of the individual and the integrity of the judicial process which gave Mr. Justice Jackson so much concern in the conspiracy cases. The hearsay was admitted below only because of the conspiracy charge which was not established. Therefore the defendant is entitled to a new trial on the substantive charge."

In the case at bar, the issue becomes more significant because of the fact that the court of appeals found as a matter of law that the conspiracy charge was not established, yet this case illustrates an even more cogent example of hearsay testimony admitted for the purpose of establishing a conspiracy than was found in *Lucido.* Like *Lucido,* the Government's potential evidence to support

the substantive charges is vastly reduced here, and the procedural advantages nullified. It would appear, at the very minimum, that the Sixth Amendment's guarantee of a fair and impartial trial demands re-trial on the substantive charges. *United States v. Lucido, supra.*

CONCLUSION

Petitioner herein submits two issues for this Court's consideration: (1) that upon reversal of Petitioner's conviction for conspiracy, the Government failed to prove guilt beyond a reasonable doubt as to the substantive charges contained in the indictment; and (2) that the admission of otherwise inadmissible hearsay evidence fatally tainted Petitioner's conviction on Counts II, III, and IV, in violation of the Sixth Amendment's guarantee of a fair and impartial trial.

Wherefore, pursuant to the foregoing, Petitioner prays that this Honorable Court issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit and pursuant thereto direct that said convictions be reversed.

Respectfully submitted,

JAMES D. O'CONNELL
Attorney for Petitioner Suchy
13818 Woodward Avenue
Highland Park, Michigan 48203
(313) 865-9289

APPENDIX A

NOTICE OF APPEAL

(U. S. District Court—Eastern District of Michigan—Southern Division)

(Filed July 12, 1974)

United States of America,
Plaintiff,
vs
Gary Suchy,
Defendant.
} Criminal No. 48556

Now comes the Defendant, GARY SUCHY, by and through his attorney, JAMES D. O'CONNELL, and hereby gives Notice of Appeal from the conviction and judgment entered thereon by the Honorable Philip Pratt, U. S. District Judge, on July 12, 1974. Said appeal being a matter of right to the United States Court of Appeals for the Sixth Circuit and pursuant to Rule 4(b)—Federal Rules of Appellate Procedure.

/s/ James D. O'Connell
Attorney for Defendant
13818 Woodward Avenue
Highland Park, Michigan 48203
865-9289

Dated: July 12, 1974.

LETTER TO HON. HENRY R. HANSSEN, CLERK

James D. O'Connell
Attorney at Law
13818 Woodward Avenue
Highland Park, Michigan 48203

Telephone 865-9289

July 12, 1974

Hon. Henry R. Hanssen, Clerk
United States District Court
Eastern District of Michigan
133 Federal Building
Detroit, Michigan 48226

Re: United States v. Gary Suchy
Criminal No: 48556

Dear Mr. Hanssen,

Enclosed is the original and one copy of my Appearance and Notice of Appeal in the above-entitled cause. Also enclosed is our check in the amount of $50.00 made payable to the Clerk, U. S. Court of Appeals, to cover the filing fee in this matter.

A separate check in the amount of $5.00 is attached to cover the cost of filing the Notice of Appeal.

Please be advised that we will require that the entire District Court record, including exhibits, be transmitted at the appropriate time to the Court of Appeals for docketing purposes.

Should the Court need additional information, please so advise.

Sincerely yours,

/s/ James D. O'Connell

APPENDIX B

ORDER

(U. S. Court of Appeals—Sixth Circuit)

(Filed April 2, 1975)

United States of America,
Plaintiff-Appellee
vs
Gary Suchy,
Defendant-Appellant.
} No. 74-1937

Before: CELEBREZZE, MILLER and ENGEL, Circuit Judges.

An indictment filed with the United States District Court for the Eastern District of Michigan on April 4, 1973 charged the defendant Gary Suchy as follows:

Count 1. Conspiring with unindicted co-conspirator Luther Gist to sell and distribute ⅛ kilogram of heroin, in violation of 21 U.S.C. §§841(a)(1) and 846.

Count 2. Unlawful possession of 21.6 grams of heroin with intent to distribute the same in violation of 21 U.S.C. §841(a)(1).

Count 3. Unlawful possession with intent to distribute approximately 189 grams of heroin in violation of 21 U.S.C. §841(a)(1).

Count 4. Unlawful distribution of approximately 189 grams of heroin in violation of 21 U.S.C. §841(a)(1).

All offenses were alleged to have occurred on or about December 14, 1972 and arose out of a raid of L & F Party

Store on Shoemaker in Detroit, the defendant Suchy having been arrested at the time of the raid.

On May 6, 1974, a district court jury found Suchy guilty as charged in counts 1, 3 and 4 of the indictment and guilty of possession of a controlled substance in violation of 21 U.S.C. §844(a), a lesser included offense under count 2 of the indictment. Suchy was subsequently given five-year concurrent sentences on counts 1, 3 and 4 and a one-year sentence on the lesser included offense under count 2, that sentence likewise to run concurrently with the others.

In his appeal, the defendant claims that the government failed to prove the existence of a conspiracy, that the evidence of 21.6 grams of heroin which formed the basis for count 2 of the indictment should have been suppressed, that the court erred in receiving the hearsay testimony of Police Officer Bernard Taylor, and finally that the introduction by way of hearsay evidence of the statements of the unindicted and then deceased co-conspirator Luther Gist denied Suchy the right of confrontation as guaranteed him under the Sixth Amendment, thus compelling reversal of the conviction on all counts.

Upon a careful review of the record in the case and of the briefs and oral argument of counsel, the court is of the opinion that there was insufficient evidence, apart from the hearsay testimony of Police Officer Taylor, from which a prima facie case of conspiracy could be made out against the defendant Suchy. Accordingly, for this reason his conviction on count 1 cannot stand. *United States v. Williams,* 503 F. 2d 50 (6th Cir. 1974).

At the same time, the court finds no error in the failure of the trial court to suppress the evidence of the heroin. The court further is of the opinion that there was ample

evidence to support the jury conviction of the defendant on the other counts and that such evidence was independent of any hearsay evidence which was admitted under the exception which obtains in conspiracy cases. Mindful of the very real dangers which attend the trial of a defendant on both conspiracy and substantive charges and especially those dangers which exist when there is an acquittal on the conspiracy charge, *United States v. Lucido,* 486 F. 2d 868 (6th Cir., 1973), the court is nevertheless of the opinion that the direct and positive evidence of the defendant's guilt on the substantive charges was sufficient and independent of the hearsay evidence so as not to require a remand and new trial on the substantive charges. A review of the record indicates that none of the hearsay evidence admitted to establish the conspiracy prejudiced Suchy's right to a fair trial on the substantive counts. *United States v. Johnson,* 462 F. 2d 608 (8th Cir. 1972).

Accordingly, IT IS ORDERED that the judgment of conviction on count 1 of the indictment is reversed and that the judgment of conviction on the lesser included offense in count 2 and on counts 3 and 4 is affirmed.

Entered By Order Of The Court

/s/ John P. Hehman
Clerk

Office of the Clerk
United States Court of Appeals
For the Sixth Circuit

Cincinnati, Ohio 45202

John P. Hehman
Clerk

Mr. James D. O'Connell
Mr. Ralph B. Guy

April 2, 1975

Re: U.S.A. vs. Gary Suchy
Case No. 74-1937
Dist. Ct. Cr. No. 48556

Gentlemen:

Enclosed is a copy of the Court's decision which was entered today in the above-styled case.

Yours very truly,

John P. Kehman, Clerk (sic)
By: /s/ Darlene Koenig
Deputy Clerk

Enclosure

APPENDIX C

PETITION FOR REHEARING

(U. S. Court of Appeals—Sixth Circuit)

United States of America, Plaintiff-Appellee vs Gary Suchy, Defendant-Appellant.	No. 74-1937

Now comes the Appellant, above-named, by and through counsel, and moves this Honorable Court for an Order directing that this Court rehear this matter, pursuant to Rule 35, of the Federal Rules of Appellate Procedure.

The sole issue presented for review is whether this Court's prior opinion is in conformity with *United States v. Lucido,* 486 F.2d 868 (6th Cir. 1973). The Court has heretofore ruled:

> "Upon a careful review of the record in this case and of the briefs and oral arguments of counsel, the court is of the opinion that there was insufficient evidence, apart from the hearsay testimony of Police Officer Taylor, from which a prima facie case of conspiracy could be made out against defendant Suchy." (Slip opinion, page 3.)

The bulk of the evidence presented at trial consisted of Officer Taylor's hearsay rendition of the alleged conspiracy, and it was admitted under the hearsay-conspiracy exception. *Lucido* teaches that even though a court may instruct the jury to disregard hearsay evidence when considering the substantive charges, the result is the same—hearsay spills over into the substantive areas. Thus if this Court determines that there was no evidence, aside from Taylor's hearsay, to convict on the conspiracy charge; and that

hearsay was admitted in furtherance of the conspiracy charge; the findings are irrefutable, the Appellant is entitled, as a matter of law, to a new trial upon the substantive offenses. *United States v. Johnson,* 344 F. Supp. 982 (1971), aff'd, 462 F.2d 608 (8th Cir. 1972); *United States v. Kelton,* 446 F.2d 669 (8th Cir. 1971).

The Supreme Court has said that convictions unsupported by evidence require reversal as violations of the due process clause, *Thompson v. City of Louisville,* 362 U. S. 199 (1960). Likewise, the Court has ruled that mere presence at the scene of the crime is insufficient to sustain the Government's burden of proof, *United States v. Williams,* 341 U. S. 58, 64 (1951).

It is the Appellant's contention that to merely assert that outside the existence of hearsay evidence, admitted in furtherance of a conspiracy, that a conspiracy conviction falls for lack of proof; and not to consider the ramifications under *Lucido,* is to take an incorrect and shortsighted view.

See, *United States v. Williams,* 503 F.2d 50 (6th Cir. 1974); *United States v. Zimmerman,* 506 F.2d 752 (6th Cir. 1974). Thus a departure from *Lucido* marks a retreat from both due process standards, *Thompson, supra;* but also dilutes the necessary and strict rules of evidence, *Panci v. United States,* 256 F.2d 308 (5th Cir. 1958).

WHEREFORE, Appellant contends that the ends of justice will be best served by a rehearing of this matter, as has been heretofore set forth.

Respectfully submitted,

/s/ James D. O'Connell
Attorney for Appellant
13818 Woodward Avenue
Highland Park, Michigan

Certificate of Service

State of Michigan
County of Wayne—ss.

I, JAMES D. O'CONNELL, first being duly sworn, do depose and state that on the 22nd day of April, 1975, I caused a copy of the foregoing Petition For Rehearing to be placed in the United States mail for delivery to Mr. Ralph B. Guy, United States Attorney, Room 817 Federal Building, Detroit, Michigan 48226

/s/ James D. O'Connell

Subscribed and sworn to before me this 22nd day of April, 1975.

/s/ Terrance R. Hogan
Notary Public, Wayne County, Michigan
Acting in Oakland County, Michigan
My Commission Expires June 20, 1978

Supreme Court, U. S.
FILED
OCT 3 1975
MICHAEL RODAK, JR., CLERK

No. 75-129

In the Supreme Court of the United States

OCTOBER TERM, 1975

GARY SUCHY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-129

GARY SUCHY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that when the court of appeals reversed his conviction on a conspiracy count it should have remanded his case for a new trial on the substantive counts of the same indictment, as hearsay, inadmissible on the substantive counts, had been admitted on the conspiracy count.

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiracy to distribute one-

eighth of a kilogram of heroin, in violation of 21 U.S.C. 846 (Count I), possession of 21.6 grams of heroin, in violation of 21 U.S.C. 844(a), a lesser included offense (Count II), possession of 189 grams of heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1) (Count III), and distribution of 189 grams of heroin, also in violation of 21 U.S.C. 841(a)(1) (Count IV).

Petitioner was sentenced to concurrent five-year terms of imprisonment on Counts I, III, and IV and to a concurrent one-year term of imprisonment on Count II. The court of appeals affirmed the conviction on the substantive counts but reversed the conspiracy conviction (Pet. App. B, pp. 29-31). A petition for rehearing, apparently untimely filed (see Pet. App. C, p. 35) was denied on June 5, 1975 (App., *infra*). The petition for a writ of certiorari was not filed until July 23, 1975, and is therefore out of time under Rule 22(2) of the Rules of this Court. In any event, there is no reason to grant the writ.

The evidence presented at trial showed that on December 13, 1972, undercover agent Taylor of the Detroit Police Department met with Luther Gist at a local store to discuss the purchase of one-eighth of a kilogram of heroin (Tr. 18-19, 23-24).[1] At that time Gist stated that he had been in contact with his source and that the source, whom Gist described as a "small Caucasian hillbilly-type person," had told

[1] "Tr." designates the transcript of the trial in the district court.

him "that he was attempting to get it together" and would let Gist know when he could deliver (Tr. 24-25). Later the same day Gist told Taylor that his source was leery about coming down to the area of the city where the store was located at that time of night and would prefer to deliver in the morning (Tr. 25-26).

The next morning Taylor again met with Gist at the store (Tr. 27). Gist stated "that he had been in contact with his man * * * [whose] name was 'Gary', and that Gary was still leery" (Tr. 27). Gist stated that he would try to contact his other source, an individual named "Bozo" (Tr. 27-28). Taylor told Gist that he would be across the street when the source arrived and would come in and get a sample (Tr. 28). Taylor also stated that his tester, who was traveling with him, would remain in his car and would have to test the substance before Taylor would complete the purchase (Tr. 28). Taylor returned to his vehicle, parked across the street from the store, and notified the surveillance personnel that the source should be delivering the heroin between 12:30 p.m. and 1:00 p.m. (Tr. 29).

When petitioner, who at that time had long hair, arrived and entered the store, Taylor walked in behind him (Tr. 30-32, 108-109). There Taylor observed petitioner and Gist briefly converse (Tr. 32). Petitioner left the store and returned to his vehicle (Tr. 32, 109). Outside, Drug Enforcement Administration (DEA) Special Agent Melvin E. Smith,

posing as Taylor's tester (Tr. 28-29, 105-107), observed petitioner enter his vehicle and return to the store "with a little white paper bag in his hand" (Tr. 109-110; see also Tr. 33-34). Inside, Gist introduced Taylor to petitioner (Tr. 34), and petitioner gave the white bag to Gist (Tr. 34). Gist instructed Taylor to accompany him to the basement, where they discussed the previous arrangements, including the price (Tr. 33, 35). Taylor asked for a sample, and Gist removed an off-white powder from a plastic packet in the white bag, placed it in a tin foil wrapper, and handed it to Taylor (Tr. 35-36). Taylor left the store and walked to the vehicle in which Smith was waiting (Tr. 36, 110-111). A field test conducted by Smith on the powder confirmed that it was heroin (Tr. 111-112; see also Tr. 14-15, 152-153).

The surveilling officers were notified to begin making arrests (Tr. 36, 40, 112-113). An officer of the Narcotics Bureau of the Detroit Police Department entered the store and proceeded to the rear (Tr. 115-119). He observed petitioner sitting on a flight of stairs leading to the second floor (Tr. 119-120). As the officer climbed past petitioner he noticed several small manila envelopes placed under the door at the top of the stairs about twelve inches away from petitioner (Tr. 120-122). He recovered the envelopes and forced open the door (Tr. 122). Except for the officer, petitioner was the only person near the top of the stairs. Tests revealed that the envelopes contained about 21.6 grams of heroin (Tr. 16, 135-136, 153).[2]

At about the same time, a DEA Special Agent entered the store (Tr. 130-132). He observed Gist run toward the back room (Tr. 132). After the agent told him to stop, Gist halted and threw a white paper bag to the floor (Tr. 132). Tests revealed that the contents of the bag consisted of 189.38 grams of heroin (Tr. 15, 134, 153).[3] When petitioner was arrested (Tr. 135), a search of his person revealed $1220, including eleven $100 bills (Tr. 137-138).

Petitioner testified on his own behalf (Tr. 176-203). He claimed that Smith and not Taylor was in the store at the time of the alleged transaction (Tr. 185-186). Petitioner denied handing Gist the white bag containing narcotics and denied having been involved in the sale of the narcotics (Tr. 186-193, 201).

Petitioner contends that since the court of appeals reversed his conspiracy conviction, his conviction on the three substantive counts was not based on substantial evidence (Pet. 10-26). The court of appeals reversed petitioner's conspiracy conviction because, aside from Taylor's testimony regarding statements Gist had made, there was insufficient proof of conspiracy (Pet. App. B, p. 30). Gist was dead at the time of trial (Tr. 52), and the court did not consider Taylor's testimony as to his statements sufficient

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[2] This heroin formed the basis for Count 2 of the indictment.

[3] This heroin formed the basis for Counts 3 and 4.

to support the conspiracy conviction. The court nevertheless correctly concluded that "there was ample evidence to support the jury conviction of the defendant on the other counts and that such evidence was independent of any hearsay evidence which was admitted under the exception which obtains in conspiracy cases" (Pet. App. B, pp. 30-31). It is clear from the court's opinion that it did not assess the non-hearsay evidence merely by normal standards of sufficiency, but rather with special sensitivity to the problems that arise from the joinder of conspiracy and substantive charges. Even under this more stringent standard it concluded, quite correctly in our view, that the evidence of petitioner's guilt on the substantive counts was so strong as to leave no doubt regarding prejudice. This determination does not merit further review. See *United States* v. *Johnson*, 462 F.2d 608 (C.A. 8), certiorari denied, 409 U.S. 952.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

---

[4] *United States* v. *Lucido*, 486 F.2d 868 (C.A. 6), upon which petitioner relies, is inapposite. In that case, unlike petitioner's, the court of appeals found no independent evidence to support the defendant's conviction on the substantive count after it reversed the conspiracy count.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 74-1937

[Filed June 5, 1975, John P. Hehman, Clerk]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GARY SUCHY, DEFENDANT-APPELLANT

ORDER

Before: CELEBREZZE, MILLER and ENGEL, Circuit Judges.

This cause came on for hearing on the petition for rehearing with a suggestion that it be reheard in banc.

It appearing to the court that no judge has requested that a vote be taken on said suggestion, the petition for rehearing was considered by the panel and was determined not to be well taken.

It is therefore ORDERED that the petition for rehearing be denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 593087 55

MOTION FILED

OCT 22 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-129

GARY SUCHY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI

— — —

AMENDED AND SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-129

GARY SUCHY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI

Petitioner moves for leave to file Amendments and Supplements to his Petition for Certiorari for the following reasons:

1. The jurisdictional statement is inaccurate and needs to be corrected.

2. Question I, in substance if not in form[1], presents a simple sufficiency-of-the-evidence issue and should be deleted as inappropriate for review here. *Hamling vs. United States,* 418 US 87, 124 (1974).

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[1] In the present Petition, Question I, although not formed as such, was argued in the Reasons for Granting the Writ as being a sufficiency-of-the-evidence issue.

3. Questions I and II should be combined and restated to better define the issue tendered.

4. A third question should be added relating to the representation of petitioner in the Court of Appeals.

5. The Statement of the Case and the Reasons for Granting the Writ will have to be amended accordingly.

6. The order of the Court of Appeals denying the petioner's Motion for Rehearing should be included in the Appendix to show this Court's jurisdiction.

Wherefore, petitioner moves for leave to amend and supplement his Petition for Writ of Certiorari in the manner following.

Respectfully submitted,

DURANT, TALBOT, GRANT and McQUARRIE
(Philip A. Gillis, Of Counsel)

By: PHILIP A. GILLIS
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Detroit, Michigan 48226
(313) 962-8210

Dated: October 14, 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-129

GARY SUCHY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI

Petitioner hereby amends and supplements the Petition for Writ of Certiorari now on file in this case as follows:

AMENDED JURISDICTIONAL STATEMENT

The Judgment of the Court of Appeals was entered on April 2, 1975. An untimely Motion for Rehearing was denied on June 5, 1975 (Appendix E, infra). The original Petiton for Writ of Certiorari was filed on July 23, 1975. Jurisdiction is conferred upon this Court by 28 USC 1254. This Petition is out of time as explained in the Reasons for Granting the Writ.

AMENDED QUESTIONS PRESENTED FOR REVIEW[1]

I.

Where a defendant is tried before a jury on charges of conspiracy and three related substantive offenses and the government fails to prove the conspiracy charge, should the defendant be granted a new trial on the substantive counts when substantial hearsay, admissible only on the theory of conspiracy, was put before the jury?

II.

Where the appellant in a criminal case unwittingly selects a nonlawyer to represent him on appeal and as a result substantial trial errors are not brought to the attention of the Court of Appeals, should this Court, in the exercise of its supervisory powers over lower federal courts, remand the case to the Court of Appeals for reargument?

[1] Questions I and II of the original Petition are combined as Question I. Question II is added by this Supplement.

AMENDED STATEMENT OF THE CASE

Petitioner was tried on a four-count indictment naming him as the only defendant and charging a conspiracy to violate and substantive violations of the Controlled Substances Act. 21 USC 841.

The case against petitioner rested substantially upon the testimony of Bernard Taylor, an undercover agent with the Narcotics Section of the Detroit Police Department. Taylor had been investigating one Luther Gist and Gist's Party Store in Detroit as a possible source of illegal narcotics. Taylor testified over objection that by December 13, 1972, he had managed to purchase heroin from Gist on four or five occasions. He said he met Gist on the evening of December 13 at the Party Store in an effort to arrange another purchase. Gist told Taylor that he had been in contact with his source and that he would be able to deliver an eighth of a kilogram of heroin the next day. Gist, Taylor claimed, then described his source as a Caucasian, small in frame, a hillbilly type with long hair, whose first name was Gary.

The next morning, December 14, at 11:00 a.m., with the surveillance crew in place, Officer Taylor said that he went into the store. He related that Gist said the heroin had not been delivered. Taylor said that he then told Gist that he would wait outside in his car and, when Gist's source arrived, he would come in and get a sample and take it out to his companion who would test it and then come back and consummate the purchase. Officer Taylor said that he then

went outside and notified the surveillance crew that a Caucasian, hillybilly type would deliver the heroin at 12:30.[2]

At 12:30 petitioner drove up in a 1969 Pontiac, parked and entered the store. Officer Taylor got out of his car and followed him in. He observed petitioner talk to Gist but could not hear what was said. Petitioner then left and went back to his car. Taylor testified that Gist then told him, "That was my man, Gary. He's got the eighth of a kee in the car for me now."

Petitioner returned to the store in a minute or two carrying a large picture and a white paper bag. Gist and Taylor followed petitioner to the rear of the store where Gist introduced Taylor to petitioner as James. Petitioner, Taylor said, gave the bag to Gist. Gist and Taylor then went to the basement of the store with the bag, where, Taylor said, Gist quoted him a price of $3900. Taylor said he wanted a sample first, so Gist reached into the bag and pulled out a plastic bag containing an off-white powder and gave a little to Taylor in a piece of tinfoil. Taylor took the sample out to the car and, after he and Agent Smith tested it, signaled the surveillance crew. While Smith and Taylor waited outside, the crew entered the store and arrested Gist and petitioner. No narcotics were recovered from petitioner.[3]

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[2] Taylor's testimony on this point was substantially contradicted by that of Special Agent Smith of the Drug Enforcement Administration. He said there was a meeting of the surveillance crew at approximately noon and that the actual operation began at about 12:15 when he and Officer Taylor arrived on the scene together in an undercover vehicle.

[3] When arrested, petitioner was seated on the third or fourth step from the top of a stairway to a second-floor apartment over the store. Partially under a locked door were two manila envelopes. The arresting officer broke the door to retrieve the envelopes, one of which contained 21.6 grams of heroin. Count II charged petitioner with possession of that heroin. The jury found him guilty of simple possession.

Petitioner's objection to Taylor's testimony of prior narcotic purchases from Gist was overruled, but the trial judge did instruct the jury at that time:

> These statements that are made in conversations with Mr. Gist, for example, who was an alleged co-conspirator, is not relevant unless it is established to your satisfaction that first a conspiracy is proved, that a conspiracy did exist; second, that Mr. Suchy was a member of that conspiracy; and, thirdly, that the statement that is now being given to you in evidence was a statement made in furtherance of that conspiracy. Otherwise, of course, this testimony would not be admissible, because it is between two people and doesn't involve Mr. Suchy unless you first find that there is a conspiracy and Mr. Suchy was a member of that conspiracy.

In response to subsequent objections on the grounds of hearsay, the Court indicated that any further limiting instructions would come at the conclusion of the trial.

Petitioner testified in his own behalf. He was 31, married seven years, and had worked in the grocery business since he was 11. He and his father owned Suchy Market, a party store in Detroit about a mile and a half from Gist's store. He and his father had planned to open another grocery store and sell their party store. Petitioner had several conversations with Gist, negotiating for Gist to purchase Suchy Market.

Peitioner testified that he went to Gist's store about lunchtime and stayed about five minutes. He bought a can of beer which he was drinking. He went out to the car to get a painting that he wanted to sell to Gist, taking the

can of beer with him in a white bag (Michigan law required beer and wine merchants to bag all purchases leaving the premises). He returned to the store with the painting and was sitting in the back room on a case of beer when ten or twelve officers came to the side entrance demanding admission. He let them in. He claimed that the officers made him sit down on the stairway, perhaps three steps from the bottom. He denied having narcotics or having any agreement with Gist concerning narcotics.

After several hours of deliberation on a Friday, the jury requested additional instructions. They were given on Monday morning, and on Monday afternoon the jury convicted petitioner on all four counts.[4]

The Court of Appeals reversed the conviction on the conspiracy Count I, ruling:

> The Court is of the opinion that there was insufficient evidence, apart from the hearsay testimony of police officer Taylor, from which a prima facie case of conspiracy could be made out against the defendant Suchy. Accordingly, for this reason his conviction on Count I cannot stand.

In affirming the three substantive convictions, the Court said:

> Mindful of the very real dangers which attend the trial of a defendant on both conspiracy and substantive charges and especially those dangers which exist when there is an acquittal on the conspiracy charge, the Court is nevertheless of the opinion that the direct and positive evidence of the defendant's guilt on the substantive charges was sufficient and independent of the hearsay evidence so as not to require a remand and new trial on the substantive charges. A review of the record indicates that none of the hearsay evidence admitted to establish the conspiracy prejudiced Suchy's right to a fair trial on the substantive counts. [Citations omitted.]

[4] On Count II they found petitioner guilty of the included offense of possession. He was sentenced to concurrent 5-year sentences on each of the felony counts and 1-year concurrently on the misdemeanor count.

PETITIONER'S REPRESENTATION IN THE COURT OF APPEALS

On appeal to the Sixth Circuit, petitioner and his family engaged the services of one Sterling Brown. Unbeknown to petitioner, Mr. Brown was not a lawyer, had never been inside a law school, and acquired whatever legal knowledge he had while an inmate of a Federal penitentiary and, upon release, his employment for six or seven months in the Federal Defender's office in Detroit.

Brown arranged for an attorney in Detroit, Mr. James O'Connell, to appear as counsel of record. Petitioner did

[5] The facts set out in this portion of our Statement are almost entirely not a matter of record. Counsel does represent that they are true to the best of their knowledge based upon their investigation which included conferences with petitioner and his family, the attorney of record in the Court of Appeals, the attorney who argued the case orally in the Court of Appeals, the printer of the Petition for Certiorari, and a review of the private files turned over to counsel upon substitution. In our Reasons for Granting the Writ, we argue that these facts should be considered by the Court even though not a matter of record.

not meet or have any contact with Mr. O'Connell until after his appeal was decided.

Brown apparently worked in Mr. O'Connell's office as a research analyst, the title given him on the stationery of Mr. O'Connell. On November 1, 1974, Mr. Brown terminated his relationship with Mr. O'Connell and moved to a Detroit suburb where he shared offices with another attorney, Mr. James Thomas, and operated an enterprise known as Benchmark Research. In January, 1975, petitioner's brief in the Court of Appeals was filed by Brown. Brown selected the issues for review and wrote the brief himself. He arranged for Thomas to argue the case in the Court of Appeals. Several substantial trial errors went unmentioned in petitioner's brief in the Court of Appeals.[6]

Petitioner met Mr. O'Connell for the first time in June or July, 1975, in connection with Mr. O'Connell's motion in this Court to recall the mandate. Although Mr. O'Connell prepared that motion, he had nothing to do with the Petition for Certiorari which we now seek to amend and supplement. It was drafted and filed by Brown.[7]

[6] To avoid making this Statement argumentative, we leave discussion of those substantial issues to the Reasons for Granting the Writ.

[7] For parallel conduct of Mr. Brown, see *Meretsky vs. United States*, No. 74-1562, Petition for Certiorari denied October 6, 1975, pp. 11-12 of the Petition. Other aspects of Mr. Brown's "law practice" are currently under investigation by the Sixth Circuit in disciplinary proceedings against two Detroit lawyers. Mr. Brown was convicted in the Cincinnati Federal District Court of violating 18 USC 1001 in connection with his oral argument of an appeal in the Sixth Circuit. He has been indicted in New York for forging the name of a New York attorney to pleadings in the Second Circuit.

REASONS FOR GRANTING THE WRIT

I.

WHEN THE PROSECUTION OBTAINS A CONVICTION ON A SUBSTANTIVE OFFENSE WITH THE AID OF SUBSTANTIAL HEARSAY ADMISSIBLE ONLY ON THE THEORY OF AN UNPROVEN CONSPIRACY CHARGE, A NEW TRIAL SHOULD BE GRANTED AT WHICH THE HEARSAY WOULD BE EXCLUDED. ONLY SUCH A PER SE RULE WILL DETER PROSECUTOR ABUSE OF THE CONSPIRACY CHARGE.

This Court has given abundant warnings of the dangers to a fair trial from the indiscriminate use of the conspiracy charge.[8] Yet, to an extent that should not be tolerated in our system of justice, the United States attorneys have ignored these warnings. Today, some prosecutors almost reflexively add conspiracy counts to charges of substantive offenses solely to gain the "procedural advantages" of a conspiracy trial, rather than out of any real need growing out of the nature of the crime.

The studied abuse of the conspiracy charge in this case stands out in stark detail because of the unusual pretrial proceedings. Petitioner and Gist were initially charged only with the substantive offense of possession with intent to distribute ¼ [⅛?] kilo of heroin.[9] Gist died January 11, 1973. On March 6, the government dismissed the Complaint against petitioner, and on April 4 he was indicted

[8] *Krulewitch vs. United States*, 336 US 440 (1949); *United States vs. Falcone*, 311 US 205 (1940); *Grunewald vs. United States*, 353 US 391 (1957).

[9] In a Complaint filed December 15, 1972, the day following arrest.

alone on the conspiracy count and three substantive counts.[10]

Why the conspiracy count? Enhancement of punishment was not involved. All of petitioner's activities upon which prosecution was based occurred on December 14 within approximately half an hour, and sentence on each count would have had to be concurrent. The conspiracy count was not needed to effect joinder of defendants.[11] The only reason was that the prosecution wanted the advantage of being able to convict petitioner with hearsay.

If Certiorari is granted, we would urge a per se rule of prejudice, requiring that wherever the government is able to put hearsay before the jury solely because of an unproven conspiracy count, any conviction on substantive counts would be set aside. Such a rule would vindicate an important right of a defendant on trial in a federal court to have his fate determined only upon the basis of evidence competent under the federal evidentiary rules or the Sixth Amendment right of confrontation. Such a rule would also accomplish what this Court's warnings have failed to do: provide a certain deterrent to the bringing of flimsy conspiracy charges where prosecution for the substantive offense would be an adequate remedy. Finally, a per se rule would avoid inconsistent results at the trial level and relieve the appellate courts of the task of making case-by-case redeterminations of the degree of prejudice from incompetent hearsay.

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[10] Gist was named as co-conspirator. Count II related to the heroin found in the room at the top of the stairs. Count III and Count IV charged possession of and distribution of the 1/8 kilo of heroin.

[11] Another frequent abuse of the conspiracy charge to promote assembly line justice under the euphemism of judicial economy.

Per se rules have great utility in substantive civil law: nuisance, libel, and restraint of trade, to mention a few. Rule 8 (b) FRCrP codifies a procedural per se rule governing joinder of defendants.[12] See also the concurring opinion of Justice Stewart in *Chapman vs. California,* 386 US 18 (1967) for additional examples of per se rules in criminal cases.

The issue tendered by this Petition is important to the administration of justice even though we can point to no conflict of Circuits on the issue. Indeed, there is very little case law to support us specifically—only *United States vs. Johnson,* 334 F Supp 982 (DC Mo 1971), and the sometime rule of the Sixth Circuit expressed in *United States vs. Lucido,* 486 F 2d 868 (CA 6 1973).[13]

Even if the Court is not prepared to adopt a per se rule of prejudice, there is sufficient indication of substantial actual prejudice to petitioner from the inadmissible hearsay to allow this Court to write an instructive opinion.[14]

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[12] The collollary to Rule 8(b) is that, unless joinder is authorized by that Rule, as it has been explained here, defendants may not be tried together. This is no technical limitation, but it is intended to prevent mass trials. If joinder is improper, severance is not a mere matter of discretion, and the overwhelming weight of authority is that a joint trial cannot be regarded as harmless error.

1 Wright, *Federal Practice and Procedure,* §144 (pp. 327-329).

The Sixth Circuit alone holds that 8(b) joinder is discretionary. *United States vs. Meretsky,* — F 2d — (decided March 17, 1975), certiorari denied October 6, 1975, 74-1562.

[13] In *Lucido* the government sought and obtained an extension of time to move for a rehearing in order to consult with the Solicitor General on the advisability of seeking review of that decision. At the very least, then, the issue verges on being important.

Perhaps the reason there aren't more cases in point is from lack of recognition of the issue by counsel rather than the lack of opportunity to raise it. Cf. *United States vs. Ridley,* 519 F 2d 791 (CA 6 1975) (appeal of Greenlee).

[14] Compare *United States vs. Arnold, Schwinn and Co,* 388 US 365, 368 (1967).

The government was able to use the hearsay evidence successfully in two ways: first, in successfully urging the trial judge to deny petitioner's Motion for Judgment of Acquittal; and second, in arguing the hearsay to the jury as proof of the conspiracy. Thus, both the judge and jury—both the instructor and the instructed—ignored the limiting instruction given once during the trial and repeated in the final instructions to the jury, showing that Justice Jackson was right in his oft-cited concurring opinion in *Krulewitch.*[15]

The hearsay which we challenge implicated petitioner directly. This is another reason for holding that there was actual prejudice to petitioner. In Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis,* 85 Harvard LR 1378 (1972), the author proposes certain rules of evidence for conspiracy trials, one of which would bar hearsay evidence directly implicating a defendant even if a conspiracy charge were supported by other evidence. He puts the Rule this way, at 1396:

> A declaration [by an alleged co-conspirator] ostensibly against the declarant's penal interest is inadmissible to the extent it implicates someone other than declarant in the criminal enterprise.

In support of this Rule the author says:

> The invocation of a name may be gratuitous, may be deliberately false in order to gain ad-

[15] "The naive assumptions that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction." [Citation omitted.]

336 US at 453.

> vantages for the declarant greater than those that would flow from naming a real participant or no one at all, may be a cover for concealment purposes . . . One can imagine a political activist being tempted to "inform" a listener he wishes to impress that he and, say, Abbie Hoffman, are working on "a deal that'll blow this town wide open!"

One can also imagine a Luther Gist who has found a steady customer in Officer Taylor and wants to conceal his source of heroin from Taylor—so that Taylor cannot deal directly and eliminate Gist's middle-man profits—by falsely identifying petitioner as his source.[16]

Much of the damaging hearsay which Officer Taylor related came, he claimed, at 11:00 on the morning of Decem-

[16] *Dutton vs. Evans,* 400 US 74 (1970), was a habeas corpus inquiry into a State conviction and necessarily only involved the Sixth and Fourteenth Amendments. Consequently, the prisoner there bore a heavier burden than we do. Nonetheless, the hearsay evidence against petitioner here certainly meets the "crucial and devastating" criteria of Dutton.

The trial of this case was not governed by the new Federal Rules of Evidence, but their enactment might be considered to detract from the importance of the issue we present. But the legislative history of Rule 804(b)(3) shows that this is not so. The house proposed the following addition to that section:

> A statement or confession offered against the accused in a criminal case made by a codefendant or other person implicating both himself and the accused, is not within this exception.

This sentence was deleted in the Senate version. In adopting the Senate version the Committee on Conference wrote:

> The conferees agree to delete the provision regarding statements by a codefendant, thereby reflecting the general approach in the Rules of Evidence to avoid attempting to codify constitutional evidentiary principles.

See generally 4 Weinstein's Evidence, 804-11 to 804-16.

ber 14. His testimony on this point was substantially contradicted by that of Special Agent Smith. See footnote 2, above. Petitioner, who had no prior criminal record of any kind, testified that he was on the premises for reasons entirely unrelated to narcotics. That a substantial fact question faced the jury is evident from their deliberations on Friday afternoon and most of Monday and their request for additional instructions. The relative strength of the government case is always a consideration in assessing the impact of any trial errors. *Fiswick vs. United States,* 329 US 211, 218 (1946).

Whether the issue we tender is decided on Sixth Amendment grounds or on federal evidentiary principles is immaterial to petitioner. Judged either by the harmless-error rule[17] or the harmless-beyond-reasonable-doubt rule of *Chapman,* petitioner's trial was unfair.

II.

THE INADEQUACY OF PETITIONER'S REPRESENTATION IN THE COURT OF APPEALS REQUIRES THAT THE CASE BE SENT BACK THERE FOR REHEARING.

The facts upon which this issue is based are not a matter of record. But this is usually so when inadequacy of representation is an issue. *Brubaker v. Dickson,* 310 F 2d 30, 32 (CA 9 1962). This Court has never hesitated to exercise its supervisory power over lower federal courts upon the basis of serious allegations made for the first time in this Court. *Mesarosh vs United States,* 352 US 1 (1956)[18]; *Kolod vs United States,* 390 US 136 (1968). The Court's

[17] Rule 52 FRCrP. *Kotteakos vs. United States,* 328 US 750 (1946).

[18] Even the dissenters in *Mesarosh* agreed that a remand was proper.

jurisdiction is not restricted because the issue was not before the Court of Appeals. This type of error should be noticed no matter how it receives the Court's attention. Rule 40(1)(d)(2) of this Court's rules. *Silber vs United States,* 370 US 717 (1962).

While appellate review is not guaranteed by our Constitution, certainly it is an important statutory right. It cannot be diminished by a denial of counsel without creating independent constitutional issues. *Griffin vs Illinois,* 351 US 12 (1956)[19]. Here, the representation in the Court of Appeals was grossly inadequate. Substantial trial errors were not raised.

None of the trial errors may merit the attention of this Court, but certainly petitioner had a right to have them considered in the Court of Appeals. For example, the Government introduced evidence that handguns were seized from Gist's store. An objection to this was sustained, but the jury heard the evidence. The Sixth Circuit condemns such evidence. *Giordano vs United States,* 185 F 2d 524 (1950). Without objection, the government introduced evidence that petitioner had $1200 on him when arrested. This, too, the Sixth Circuit condemns. *United States vs Dean,* 435 F 2d 1 (1970). See also *Williams vs United States,* 168 US 382 (1897).

A most fundamental error was the inadequate treatment of reasonable doubt in the jury instructions. It was defined

[19] Cf. *Morrissey v. Brewer,* 408 US 471 at 481 (1972):

> This Court has now rejected the concept that Constitutional rights turn upon whether a governmental benefit is characterized as a "right" or as a "privilege". Whether any procedural protections are due depends on the extent to which an individual will be condemned to suffer grievous loss.
>
> [Citations and interior quotations omitted.]

as "the kind of doubt that would make a reasonable person hesitate to act." Later, the trial judge said, "Proof beyond a reasonable doubt [is] proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in your own affairs." This latter instruction, modified from Devitt and Blackmar, *Federal Jury Practice and Instructions,* (2nd ed) §11.01, to omit "in the most important of your affairs" is almost the very one criticized in *Holland vs United States,* 348 US 121, 140 (1954).[20] A reasonable person might select a restaurant upon the recommendation of a stranger or casual acquaintance, but in home, career, or spouse selection—the most important and serious affairs of life—no reasonable person would not demand more evidence. The Court gave an instruction on presumption of innocence cast in terms of reasonable doubt rather than as a separate concept, again following Devitt and Blackmar, §11.01, more or less. The two concepts, though closely related, are distinct and should be charged separately. *Coffin vs United States*, 156 US 432 (1895). (No objection to these instructions was made, and any claim in the Court of Appeals would have had to be made under Rule 52 FRCrP.)

Finally, petitioner should have the opportunity, through competent counsel, to attempt to persuade the Court of Appeals that on the *Lucido* issue, the hearsay admitted under the unproven conspiracy charge was "crucial and devastating." Who knows but, if we are given that opportunity, it may be the government's turn to come knocking at this Court's door, (See footnote 13 above).

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[20] At least, the authors had the good grace in the second edition to remove the citation of Holland as supporting such an instruction.

CONCLUSION

The Petition is out of time by at least three weeks and more if the Court considers that the Petition for Rehearing in the Court of Appeals was also out of time. Nonetheless the Court does have jurisdiction to consider it, *Taglianetti vs United States,* 394 US 316 (1969); *Schacht vs United States,* 398 US 58 (1970), [a delay of 101 days in filing the Petition]. The delay was caused by the inadequate representation which the Petition challenges and which representation continued right into this Court. Only a sophist would argue that petitioner's inadequate representation thus far denies him the right to challenge that inadequate representation.

The Petition for Certiorari should be granted to consider the important hearsay question presented. If the Court is not persuaded to consider that issue now and is not prepared to address the second issue in plenary review, at the very least the Judgment below should be vacated, and the case remanded to the Court of Appeals for a determination of whether petitioner was so inadequately represented that the case should be rebriefed and reargued.

DURANT, TALBOT, GRANT AND MCQUARRIE
(PHILIP A. GILLIS, Of Counsel)
By: PHILIP A. GILLIS
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Dated: October 15, 1975

APPENDIX E

(United States Court of Appeals for the Sixth Circuit)

No. 74-1937

(Filed June 5, 1975)

United States of America,
Plaintiff-Appellee,
v.
Gary Suchy,
Defendant-Appellant.

ORDER

Before: Celebrezze, Miller and Engel, Circuit Judges.

This cause came on for hearing on the petition for rehearing with a suggestion that it be reheard *en banc.*

It appearing to the court that no judge has requested that a vote be taken on said suggestion, the petition for rehearing was considered by the panel and was determined not to be well taken.

It is therefore Ordered that the petition for rehearing be denied.

Entered By Order Of The Court

/s/ John P. Hehman
Clerk

Supreme Court, U.S.
FILED
DEC 2 1975
MICHAEL RODAK, JR., CLERK

No. 75-129

In the Supreme Court of the United States

OCTOBER TERM, 1975

GARY SUCHY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-129

GARY SUCHY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

Petitioner, in his amended and supplemental petition for a writ of certiorari, reiterates the basic contentions of his original petition but makes the additional contention that he was deceived into hiring a non-lawyer to represent him in his appeal from his conviction, and that he was thereby denied the assistance of counsel. In this supplemental memorandum we respond to the new contention.

1. At petitioner's trial in May 1974, in which he was convicted of possession and distribution of heroin and conspiracy, he was represented by two lawyers, David Harris and Raymond J. DeRyck, members of the Michigan bar. Petitioner does not complain of their qualifications or the quality of their representation. In the revised petition for a writ of certiorari, however, petitioner states that he hired Sterling Brown, a non-lawyer, to represent him in the court of appeals on the appeal from his conviction, on the mistaken assumption that Brown was a lawyer; he further states that Brown wrote his brief on appeal and arranged for James Thomas, a lawyer with whom Brown shared offices, to present oral argument on petitioner's appeal.[1]

Brown, as petitioner points out, was convicted in the United States District Court for the Southern District of Ohio of falsely representing himself to be a lawyer before the United States Court of Appeals for the Sixth Circuit and before the United States District Court for the Southern District of Ohio. Moreover, on May 30, 1975, Thomas, who argued the case on behalf of petitioner in the court below, was ordered to show cause why he should not

[1] The brief filed in behalf of petitioner in the court below names James D. O'Connell, the attorney whose name appears on the original petition for a writ of certiorari filed in the instant case on August 8, 1975, as the attorney for petitioner. There is also an entry of appearance on behalf of petitioner in the name of O'Connell in July 1973, in the district court, on the day that petitioner noted an appeal from his conviction.

be subjected to disciplinary action for sponsoring the admission of Brown to the court of appeals on February 19, 1975, when Brown presented oral argument in that court for two appellants in another case.

2. A federal criminal defendant is, of course, entitled to have a lawyer represent him on appeal, and, in that role, select and present the issues warranting review in a brief and present the case in oral argument if such argument is granted. See, *e.g.*, *Johnson* v. *United States*, 352 U.S. 565; *Elchuk* v. *United States*, 370 U.S. 722. This requirement of assistance of counsel is not satisfied when a defendant chooses to be represented by a person he reasonably believes to be a qualified lawyer but who, in fact, is a layman. *Harrison* v. *United States*, 387 F.2d 203, 212-213 (C.A.D.C.), reversed on other grounds, 392 U.S. 219. If petitioner was in fact deceived into hiring Brown on appeal by a false representation that Brown was a genuine lawyer, and the latter "selected the issues for review and wrote the brief himself" without the supervision and guidance of a qualified lawyer, petitioner was denied the assistance of counsel on appeal. On the other hand, if petitioner hired Brown knowing that the latter was not a lawyer, he presumably would not be entitled to relief.[2]

Although, as is apparent, there are unresolved factual questions as to whether petitioner was denied proper representation upon appeal, there is substan-

[2] He also would not be entitled to relief if he hired a lawyer, Thomas, who simply used lay people to assist him in preparing a brief under his supervision.

tial evidence that he may have been. We thus do not urge that the case be remanded to the district court for an evidentiary hearing on that question. Rather, we suggest that it would be more expeditious to remand the case to the court of appeals for further proceedings in which petitioner's present attorney can be afforded an opportunity to file a petition for rehearing setting forth the issues that he believes require further briefing and argument. Since the court of appeals has already reviewed the record in this case and has heard oral argument by a lawyer (Thomas) on petitioner's behalf, it is that court which is best able to determine whether additional briefing (beyond that which may be presented in the petition for re-hearing) and oral argument are necessary for a fair resolution of the appeal.

For the foregoing reasons we respectfully submit that certiorari should be granted and the case remanded to the court of appeals for further proceedings in which petitioner will be allowed to file a petition for rehearing and in which that court may determine whether further briefing and argument are necessary.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

GARY SUCHY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY

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I

In footnote 4 respondent asserts that *United States v Lucido* is inapposite because "the Court of Appeals found no independent evidence to support the defendant's conviction on the substantive count." That simply is not true. There was evidence to support the substantive count, and that is precisely why, in reversing the conviction, the *Lucido* Court ordered a new trial rather than dismissal of the indictment.

II.

In its response to our Amended Petition, the government does not urge a remand for an evidentiary hearing, appar-

ently conceding that "there is substantial evidence that [petitioner] may have been [denied proper representation on appeal] (pp 3-4). Instead, the government suggests that petitioner be allowed to file a motion for rehearing with the Court of Appeals to allow it to determine "whether further briefing and [oral] argument are necessary."

Such limited relief is entirely inappropriate and inadequate. Petitioner is entitled to a full appeal—a calendar brief prepared by an advocate for his cause and oral argument of the issues raised. The Court of Appeals sitting in banc assisted by all of its parajudicial aids in reviewing the record could not provide an adequate substitute. *Anders v California,* 386 US 738 (1967); *Ellis v United States,* 356 US 674 (1958).

If this Court does not wish to grant plenary review of either of our questions, only vacation of the judgment below and full reargument of the appeal would vindicate petitioner's right to counsel.

The panel below has already expressed its opinion on our *Lucido* issue. This was on the Court's own initiative. Petitioner's "lawyer" didn't cite *Lucido* to the Court or even mention in his brief the issue decided in *Lucido.* In order for petitioner to have a fair hearing of his appeal, it should be before a panel whose members have expressed no opinion on the issues of the appeal.

Respectfully submitted,

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